

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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PHILLIP HOFF,

Plaintiff,

v.

COUNTY OF SISKIYOU, an
administrative body; ANDREA FOX,
ex-HOA manager; and DOES 1-10,
inclusive,

Defendants.

No. 2:23-cv-00535 WBS JDP

ORDER

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Plaintiff Phillip Hoff filed a third amended complaint (Third Am. Compl. ("TAC") (Docket No. 21)) after the court dismissed his second amended complaint with leave to amend (Order (Docket No. 20)). The court now considers defendants Siskiyou County and Andrea Fox's motion to strike (Mot. to Strike (Docket No. 28-1)) and motion to dismiss (Mot. to Dismiss (Docket No. 27-1)).¹

¹ Except where necessary, the court will not recite the

1 I. Motion to Strike

2 Defendants move to strike the TAC in its entirety
3 because it was filed seven days past the court's deadline. (Mot.
4 to Strike.) Plaintiff's TAC is clearly untimely. However,
5 defendants do not allege any prejudice suffered as a result.
6 Accordingly, the court will not strike the TAC in its entirety on
7 this basis.²

8 Alternatively, defendants move to strike certain
9 portions of exhibits included with the TAC on the grounds that
10 they are irrelevant and immaterial. (Mot. to Strike at 5.)
11 Specifically, defendants target the following documents: (1) A
12 document containing the text of California Government Code §
13 12956(b) (1) (TAC at 68); (2) a document excerpting from
14 Government Code § 12956.1(b) (1) and §§ 12956.2(a) (1), (b) (1), and
15 (c) (id. at 86); and (3) Grant of Right of Way (id. at 94).
16 (Mot. to Strike at 5.)

17 Federal Rule of Civil Procedure 12(f) provides that the
18 court may "strike from a pleading an insufficient defense or any
19 redundant, immaterial, impertinent, or scandalous matter." Fed.
20 R. Civ. P. 12(f). However, "[m]otions to strike should not be
21

22 relevant factual background or legal standards because they are
23 already set forth in the court's order dismissing the second
amended complaint. (See generally Order.)

24 ² This is the second time that plaintiff has failed to
25 comply with the court's orders. Previously, plaintiff's counsel
26 failed to appear for oral argument on defendants' motion to
27 dismiss the second amended, complaint without prior notice to the
court or to defendants. (Docket No. 18.) Subsequent failures to
28 comply with the court's orders will require plaintiff to show
cause why the court should not impose appropriate sanctions.

1 granted unless the matter to be stricken clearly could have no
2 possible bearing on the subject of the litigation or unless
3 prejudice would result to the moving party from denial of the
4 motion." Delgado v. Marketsource, Inc., No. 17-CV-07370-LHK,
5 2019 WL 1904216, at *3 (N.D. Cal. Apr. 29, 2019) (internal
6 quotations and citations omitted).

7 Defendants argue only that "Based on the allegations
8 and legal claims contained in the TAC, the following exhibits
9 appear immaterial and should be stricken." (Mot. to Strike at
10 5.) Defendants do not argue that they would be prejudiced if the
11 motion were denied. Accordingly, the court will deny defendants'
12 motion to strike.

13 II. Motion to Dismiss

14 A. Due Process (Claim 1)

15 The court previously dismissed plaintiff's due process
16 claim because he failed to allege (1) any facts establishing a
17 constitutionally protected property interest in a permit for his
18 second container, and (2) any facts showing that his permit was
19 revoked. (Order at 6-7.)

20 1. Constitutional Right to Hardship Variance

21 Plaintiff now argues that he has a constitutionally
22 protected interest in a hardship variance for his second
23 container. Plaintiff applied for the hardship variance on
24 October 28, 2022 after the County allegedly revoked his permit,
25 which he alleges was granted verbally in January 2022. (TAC ¶¶
26, 28 & at 18.) The County closed plaintiffs' variance
27 application as incomplete on March 7, 2023. (Id. at 92.)

28 Plaintiff argues that the County is obligated to issue

1 the variance once certain conditions are met, and that plaintiff
2 in fact met "any and all requirements of the County Code."³ (Id.
3 ¶¶ 45-47.) However, it appears plaintiff's variance application
4 was denied because plaintiff refused to agree to an indemnity
5 agreement. The Siskiyou County Planning Division's Variance
6 Application Guide (TAC ¶ 46 ("Appl. Guide")) states that all
7 applicants must submit an indemnification agreement along with
8 their variance applications.⁴ (Id. at 5-6.) Plaintiff
9 ultimately refused to submit one. (TAC ¶ 48 and at 92 ("The
10 Siskiyou County Community Development Department cannot proceed
11 with your project as a fully executed Agreement for
12 Indemnification is required.").)

13 "Protected property interests are not created by the
14 Constitution, but by existing rules or understandings that stem
15 from . . . state law rules or understandings that secure certain
16 benefits and that support claims of entitlement to those
17 benefits." Guatay Christian Fellowship v. Cnty. of San Diego,

18 ³ Plaintiff fails to elaborate what those requirements
19 are. Although plaintiff cites to Siskiyou County Ordinance § 10-
20 6.3602.195 (TAC ¶ 45), this section simply defines what a
21 "hardship variance" is: "a departure from the provisions of this
22 chapter relating to setbacks, side yards, frontage requirements,
23 and lot size, but not involving the actual use or structure." Id. It speaks nothing of how the County evaluates hardship
variance applications or what the requirements for approval are.

24 ⁴ Further, the Application Guide clearly states that "[a]
25 variance from the terms of the county ordinance shall be granted
26 only when, because of special circumstances applicable to the
27 property, including size, shape, topography, location or
surroundings, the strict application of county code deprives such
property of privileges enjoyed by other property in the vicinity
and under an identical zoning classification." (Appl. Guide at
2-3.)

1 670 F.3d 957, 985 (9th Cir. 2011) (citation omitted). Here, the
2 applicable “state law rules or understandings” make it clear that
3 hardship variances, far from being an entitlement, are awarded
4 only in special circumstances and pursuant to an application
5 process, neither of which plaintiff satisfied. Accordingly,
6 plaintiff fails to allege a due process claim relating to the
7 denial of the variance.

8 2. Revocation of Permit

9 Plaintiff’s sole new allegation regarding revocation is
10 as follows: “HOFF’s permit that was verbally granted was
11 revoked.” (Id. ¶ 52.) This, without more, cannot support a due
12 process claim even at the pleading stage because it “tenders
13 naked assertions devoid of further factual enhancement.”
14 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

15 Plaintiff’s claim is defective even if the court
16 assumes that plaintiff argues for a constructive revocation of
17 his permit, based either on the County’s citation of his
18 container (id. ¶¶ 27, 30-31, 50) or the County’s denial of his
19 subsequent hardship variance application (id. ¶¶ 29, 37-39, 48-
20 49, 53). Plaintiff had an opportunity to challenge the citation
21 in an administrative hearing that plaintiff presumably attended
22 on September 21, 2022. (Id. ¶ 30.) This satisfies due process
23 here. See Makdessian v. City of Mountain View, 152 F. App’x 642,
24 644 (9th Cir. 2005) (due process satisfied upon notice and
25 opportunity to be heard before deprivation of significant
26 property interest). And, unlike his allegations regarding his
27 permit, plaintiff does not allege he was ever granted a variance
28 in the first place that was later revoked. Instead, plaintiff’s

1 own allegations show that his hardship variance application was
2 never even finalized because plaintiff ultimately refused to
3 agree to an indemnity, as required by Siskiyou County
4 regulations. (TAC at 92; see § II.A.1, supra.)

5 The court therefore concludes that plaintiff fails to
6 sufficiently allege a constitutional property interest in a
7 permit or hardship variance for his second container, or that any
8 permit or variance was revoked in violation of due process.

9 Accordingly, the court will dismiss this claim.

10 B. Unreasonable Seizure (Claim 2)

11 The court previously dismissed plaintiff's Fourth
12 Amendment claim because plaintiff failed to sufficiently allege
13 that the County interfered with his property rights. (Order at
14 7-8.) Plaintiff now affirmatively alleges that the County
15 effectively forced plaintiff to deed away his container to a
16 Buddhist temple, cut the gate and locks to his property, seized
17 his solar panels and umbrellas, and bulldozed trash onto his
18 land. (Id. ¶¶ 31, 61-63.)

19 Defendants suggest that these allegations should not be
20 considered because they are "fanciful" and "frivolous" (Mot. at
21 10), but all plaintiff needs to allege at the pleading stage is
22 that there is "more than a sheer possibility that [the County]
23 has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678
24 (2009). The court accordingly finds that plaintiff has pled a
25 Fourth Amendment injury "plausible on its face." Bell Atl. Corp.
26 v. Twombly, 550 U.S. 544, 570 (2007).

27 However, plaintiff fails to allege facts sufficient to
28 attach liability to the County. A local governmental unit may

1 not be held responsible for the acts of its employees under a
 2 respondeat superior theory of liability. See Bd. of Cnty.
 3 Comm'rs v. Brown, 520 U.S. 397, 403 (1997); Benavidez v. Cnty. of
 4 San Diego, 993 F.3d 1134, 1153 (9th Cir. 2021) ("'[A]
 5 municipality cannot be held liable solely because it employs a
 6 tortfeasor -- or, in other words, a municipality cannot be held
 7 liable under § 1983 on a respondeat superior theory.'" (quoting
 8 Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658,
 9 691 (1978)). Rather, a plaintiff must demonstrate that the
 10 alleged constitutional deprivation "may fairly be said to
 11 represent official policy" King v. Cnty. of Los Angeles,
 12 885 F.3d 548, 558 (9th Cir. 2018).

13 Here, plaintiff fails to allege any facts suggesting
 14 that any County policy or custom or direction from a decision-
 15 making official was responsible for the acts that ground
 16 plaintiff's Fourth Amendment claim.⁵ Plaintiff does appear to
 17 argue in his opposition that defendant Andrea Fox had some
 18 supervisory authority over the unnamed individuals who carried
 19 out the alleged unlawful acts; that Fox herself "personally
 20 participated in the constitutional violation;" that there exists
 21 a sufficient causal connection between Fox's conduct and the

22 5 Plaintiff fails to allege that any specific person, in
 23 whatever capacity, committed the acts. Instead, he only alleges
 24 that the County itself engaged in the specific acts interfering
 25 with his property. (TAC ¶¶ 32-34, 61-63.) Defendants correctly
 26 point out that Siskiyou County is an entity, not an individual
 27 capable of trespass, property damage, and theft. (Docket No. 32
 28 (Reply) at 5.) The court therefore draws the inference that
 plaintiff's allegations of unlawful acts are directed to the
 individual defendants, named and unnamed, in their official
 capacities, but not in their individual capacities.

1 alleged constitutional violations; and that this therefore
2 comprised an official municipal act. (Opp'n (Docket No. 31) at
3 16.) However, plaintiff must allege facts showing that Fox is
4 "responsible for establishing final policy" consequently
5 attributable to the county. Benavidez v. Cnty. of San Diego, 993
6 F.3d 1134, 1153 (9th Cir. 2021).

7 Accordingly, the court will dismiss this claim.

8 C. Equal Protection (Claim 3)

9 The court previously dismissed plaintiff's "class of
10 one" equal protection claim because he failed to sufficiently
11 show that his neighbors were directly comparable to him in all
12 material respects. (Order at 10.) For example, the court found
13 that plaintiff's allegation that neighboring properties were
14 "crowded with trailers and motor homes in violation of other
15 County ordinances and/or regulations" left it unclear whether
16 neighboring parcels of land had any Conex containers subject to
17 the same permitting requirements. (Id. at 9-10.)

18 Plaintiff now alleges that "several homes in and around
19 HOFF's land parcel" also have two or more Conex containers on
20 their property "without any permitting requirements, and no
21 variance hardships," (TAC ¶ 72) which the court construes to mean
22 that his neighbors who have more than one Conex container on
23 their property have not been cited even though they do not have
24 any required permits or hardship variances.

25 This is sufficient to state a claim at the pleading
26 stage. All that plaintiff must allege now are facts showing that
27 (1) he has been "intentionally treated differently from others
28 similarly situated," and that (2) "there is no rational basis for

1 the difference in treatment." Village of Willowbrook v. Olech,
2 528 U.S. 562, 564 (2000). Plaintiff alleges a few theories for
3 intentional mistreatment: comparative lack of political
4 connections (TAC ¶¶ 23, 71); his disability (id. ¶ 70); and
5 personal animus towards him harbored by Fox (id. ¶¶ 19-21).
6 Plaintiff also now alleges that several of his neighbors have two
7 or more containers on their properties, but without permits or
8 having been cited for a lack of permits. (Id. ¶ 72.) This is
9 enough to establish plaintiff's neighbors as apt comparators at
10 the pleading stage.

11 Accordingly, the court will not dismiss this claim.

12 D. Disability Discrimination (Claim 4)

13 The court previously dismissed plaintiff's disability
14 discrimination claim because plaintiff did not allege any facts
15 showing that the County denied him his permit or variance on the
16 basis of his disability. (Order at 11.)

17 Plaintiff's claim still fails for the same reason.
18 Plaintiff now alleges that Fox knew of his traumatic brain injury
19 (TAC ¶¶ 82, 86), but still fails to plead any facts to support
20 his conclusory allegation that "[t]he denial of the permit and
21 hardship waiver was by reason of [plaintiff's] disability." (Id.
22 ¶ 89.) Accordingly, the court will dismiss this claim.

23 E. Regulatory Taking (Claim 7)

24 The court previously dismissed plaintiff's regulatory
25 taking claim because it was premised entirely on his inability to
26 obtain a permit for his second container. (Order at 12.)

27 Plaintiff now alleges theft and trespass as additional bases for
28 this claim. (TAC ¶ 111 ("The COUNTY's bulldozing of trash,

1 cutting of locks, and interfering with properties both personal
2 [solar panels, Conex containers, locks, umbrellas] and realty of
3 HOFF is akin to a regulatory taking."); see supra, at § II.B.)
4 The court will analyze plaintiff's takings claim solely as to
5 these new allegations.

6 The Takings Clause of the Fifth Amendment provides:
7 "[N]or shall private property be taken for public use, without
8 just compensation." U.S. Const. amend V. "As its text makes
9 plain, the Takings Clause does not prohibit the taking of private
10 property, but instead places a condition on the exercise of that
11 power. In other words, it is designed not to limit the
12 governmental interference with property rights *per se*, but rather
13 to secure compensation in the event of otherwise proper
14 interference amounting to a taking." Lingle v. Chevron U.S.A.
15 Inc., 544 U.S. 528, 536-37 (2005) (citations omitted).

16 Here, plaintiff fails to allege any facts suggesting
17 that the County's alleged actions constituted lawful interference
18 with his property rights. Neither does he allege any plausible
19 "public use" of his property that motivated the County's alleged
20 actions. Instead, plaintiff's new allegations amount to nothing
21 more than a recitation of facts supporting his unreasonable
22 seizure claim.

23 Accordingly, the court will dismiss this claim.

24 F. State Law Claims (Claims 5, 6)

25 The court previously dismissed plaintiff's claims for
26 financial elder abuse and negligence because plaintiff failed to
27 show that he presented these claims to the County pursuant to the
28 Government Claims Act, Cal. Gov. Code §§ 905, 945.4, 950.2.

1 (Order at 12-13.) Plaintiff fails to do so again.⁶ Accordingly,
2 the court will dismiss this claim.

3 G. Leave to Amend

4 Plaintiff shall have one final opportunity to amend his
5 complaint as to the dismissed claims. As this will be
6 plaintiff's fourth opportunity to amend his complaint, the court
7 will not grant leave to add any additional claims or defendants.

8 IT IS THEREFORE ORDERED that defendants' motion to
9 strike (Docket No. 28) be, and the same hereby is, DENIED.

10 IT IS FURTHER ORDERED that defendants' motion to
11 dismiss (Docket No. 27) be, and the same hereby is, DENIED as to
12 plaintiff's equal protection claim (Claim 3). Defendants' motion
13 to dismiss GRANTED as to all other claims.⁷ Plaintiff has leave
14 to amend his complaint as to the dismissed claims, but does not
15 have leave to add additional claims or additional defendants.
16 Plaintiff shall file a fourth amended complaint **within twenty**
17 **days** of the issuance of this order, if he is able to do so
18 consistent with this order.

19 Dated: January 9, 2024


WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

22 ⁶ In his opposition, plaintiff appears to argue that
23 presentation of his claims to the County should be excused
24 because it would be futile. (Opp'n at 20-22.) Not only do none
25 of plaintiff's cited cases discuss excusal from the Government
Claims Act's presentation requirement; plaintiff also fails to
allege any facts supporting his argument that presenting his
claims, as required by statute, would be in vain.

26 ⁷ Defendants' Request for Judicial Notice (Docket No. 27-
27 2) is DENIED as moot because the court need not rely on the
28 materials therein to reach its decision.